

MEMORANDUM

To: William Pfancuff, Deputy Chief Information Officer, Department of the Interior

Through: Timothy S. Elliott, Acting Associate Solicitor, Division of General Law

From: James L. Weiner, Attorney, Branch of Procurement and Patents,
Division of General Law

Subject: "Year 2000 Information and Readiness Disclosure Act"

You have asked for our initial legal reading on the "Year 2000 Information and Readiness Disclosure Act" (the "Act"), signed by the President on October 19, 1998, particularly as it pertains to actions that have been or may be taken by the Department of the Interior ("DOI") and its bureaus.

The Act is a relatively complicated piece of legislation and we have had little time to analyze it; however, we believe the protection it creates is mainly procedural. It appears to provide some additional legal protection for post-July 14, 1998 "year 2000 statements" made by public or private entities responsible for the Year 2000 ("Y2K") compliance of systems or software.

1. Except for a fraudulent statement, the Act would protect the "maker" of a "year 2000 statement" made after July 14, 1998 from liability for such statements if the statement turns out not to be true. Act, §§4(b), 7(a)(3)(A). A reasonable interpretation of this is that no agency liability will arise solely by virtue of a qualifying "year 2000 statement."
2. The Act also would protect the "maker" of a "year 2000 *readiness disclosure*"--which is a *written* "year 2000 statement" made after October 19, 1998, that is specifically *identified as* a "year 2000 readiness disclosure"--from the use of that statement against the maker to prove its truth. Act, §§4(a), 7(a)(3)(B).

Two things are notable here. First, *no action* is necessary to trigger the Act's protection of a "year 2000 statement," whereas a "year 2000 readiness disclosure" must be so labeled in order to gain the Act's protection. Second, a "year 2000 statement" cannot be used in an action based solely on the statement being *false or misleading*, whereas a "year 2000 readiness disclosure" cannot be used against the maker to prove its *truth*. Thus, the Act's treatment of a "year 2000 statement" would be most meaningful if the statement could be interpreted to exaggerate an agency's Y2K readiness, whereas the Act's protection of a "year 2000 readiness disclosure" is most meaningful if the statement honestly identifies shortcomings or difficulties in the agency's Y2K readiness efforts.

3. The Act has a “grandparenting” provision that enables entities to give any pre-October 19, 1998 “year 2000 statement” the same protection under the Act as a “year 2000 readiness disclosure.” Act, §7(b). The steps for doing so, which were adequately set forth in the “URGENT ATTENTION” memorandum that our office assisted your office in drafting (see attachment), must be accomplished by December 3, 1998. Interestingly, with respect to the Act’s “grandparenting” provision for past year 2000 statements, John Koskinen, who is the Administration’s principal Y2K official, has stated informally that “. . . I don’t know what ‘readiness’ statements any Federal agency has been making in a context that some is likely to sue them based on the statement or use the statement in a lawsuit against them,” and has further stated that “it will be unfortunate if we waste a lot of time and resources [on grandparenting] where there is little or no reason to do so.” E-mail of November 20, 1998, forwarded from Virginia A. Huth, OMB, to Julia Laws, DOI. I have also spoken to the Justice Department’s chief Y2K compliance officer, Don Wolfrey, and he had not even heard of this issue. He also could not identify any particular legal group at Justice that is advising on or reacting to this legislation.

We believe that the following conclusions may be drawn from this. First, there is no reason not to attempt to invoke whatever protections the Act may provide to current and future “year 2000 readiness disclosures” by conspicuously labeling those disclosures as the Act provides. Second, it may take a great deal of effort for agency and bureau Y2K executives and managers over the next week to attempt to “grandparent” past statements. The “URGENT ATTENTION” memorandum outlined what must be done in order to “grandparent” a particular year 2000 statement as a “year 2000 readiness disclosure.” We suggest that you consider the legal protection outlined above in deciding whether to ask the bureaus to expend that effort.